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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5775

EDDIE SPRAGGINS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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November 24, 1980

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Petitioner, :

-against- :

STATE OF GEORGIA, :

Respondent. :

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner Eddie Spraggins ("petitioner") prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia affirming his sentence to death for murder.

OPINION BELOW

The opinion of the Supreme Court of Georgia on remand from this Court is not yet officially reported and is annexed as Appendix A. The judgment of the Supreme Court of Georgia on petitioner's initial appeal is reported at 252 S.E.2d 620 (1979), and is attached as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Georgia on remand was entered on September 24, 1980. No motion for rehearing was filed. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

In Gregg v. Georgia, 428 U.S. 153 (1976) and Godfrey v. Georgia, ___U.S.___, 64 L. Ed. 2d 398 (1980), the Court stated that the constitutional concerns expressed in Furman v. Georgia, 408 U.S. 238 (1972), which resulted in the invalidation of Georgia's death penalty statute, could be met by a carefully drafted statute that ensures that the sentencing authority's discretion is suitably directed and limited so as to minimize the risk of arbitrary and capricious imposition of the death sentence. The Court in Gregg then ruled that the procedures adopted in Georgia's amended death penalty statute created a constitutional system with safeguards to ensure against a jury's arbitrary and capricious infliction of the death sentence.

This case raises the question whether the Georgia death penalty statute, though capable of constitutional construction, has been interpreted and applied in such a way that the safeguards against random and arbitrary action are ineffective to meet the constitutional objections raised in Furman and restated in Gregg and Godfrey. Specifically, this case presents the following questions:

1. Whether the judge's written instructions to the sentencing jury violated the Eighth and Fourteenth Amendments by effectively precluding consideration of mitigating circumstances because they failed to state that even if the jury found aggravating circumstances, a life sentence could be imposed.

2. Whether the judge's written instructions to the jury violated the Eighth and Fourteenth Amendments by effectively precluding consideration of mitigating circumstances because

they failed to state that the jury should consider the mitigating circumstances presented by the evidence in determining the appropriate sentence?

3. Whether the jury's consideration of inflammatory evidence without the guidance of judicial standards deprived petitioner of the circumscribed sentencing procedure recognized in Gregg to be required by the Eighth and Fourteenth Amendments?

4. Whether the automatic appellate review provided by statute was adequate to ensure against the random, arbitrary and unconstitutional imposition of the death penalty?

5. Whether the fact that no jury ever sentenced petitioner on the basis of a statutory aggravating circumstance that was so clearly defined as to neutralize subjective inflammation of the jurors violated Petitioner's Sixth Amendment rights?

6. Whether the ultimate sentencing jury's consideration of an aggravating circumstance which was not established in the first trial violated the Fifth Amendment's ban against double jeopardy?

7. Whether petitioner was denied due process of law when the prosecution was permitted to submit proof to the jury on the existence of an additional aggravating circumstance?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This cause involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, set forth as Appendix C.

2. This cause also involves the following statutes of the State of Georgia, included in Appendix C hereto: Ga. Code Ann. §§ 27-2206; 27-2503; 27-2534.1; 27-2537.

STATEMENT OF FACTS

Petitioner is a 34 year-old man. His intellectual range has been diagnosed as that of mild mental retardation. He left school after eighth grade, having failed every course he ever took, and is -- and apparently always has been -- functionally illiterate.

On March 1 and 2, 1977, petitioner was tried and found guilty of the rape and murder of Frances Coe, a fifty-five year-old neighbor, on January 31, 1977. Petitioner was sentenced to death for the murder, upon the jury's finding that a statutory aggravating circumstance, i.e., the rape of the victim, existed. Ga. Code Ann. § 27-2534.1.

The evidence upon which the jury made its determinations is summarized in the Georgia Supreme Court's review of that trial at 240 Ga. 759, 243 S.E. 2d 20, 22 (1978) (Appendix D hereto) and included the following: (i) an unsigned confession (Tr. -1 at 55) which was repudiated by Petitioner on the stand (Tr. -1 at 114);* (ii) testimony by the doctor who performed the autopsy on the victim that some of the injuries were consistent with those associated with sexual relations (Tr. -1 at 70, 71); (iii) detailed descriptions of the wounds and condition of the victim's body, including photographs graphically depicting those descriptions (Tr. -1 at 69-73, 40-41, 93, 94); (iv) testimony that the petitioner could never learn in school (Tr. -1 at 103, 104, 111), could not read (Tr. -1 at 104) and was heavily drinking the night of the murder (Tr. -1 at 112).

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* Throughout this petition, references to the transcript of the lower court in the 1977 trial will be designated as "(Tr. -1 at ____)".

On appeal of the conviction and sentence to the Supreme Court of Georgia, that Court, on February 21, 1978, affirmed the convictions for murder and rape, but reversed as to the death sentence for murder (Appendix D). Spraggins v. State, 240 Ga. 759, 243 S.E. 2d 20 (1978) (hereinafter "Spraggins I"). The grounds of the reversal were that:

> The [trial] court's sentencing instructions failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance (Fleming v. State, 240 Ga. 142(7)), 240 S.E. 2d 37 (1977), and failed to inform the jury that they were authorized to consider mitigating circumstances in contravention of requirements laid down in Code Ann. §§ 27-2534.1(b) and 27-2534.1(c), Hawes v. State, 240 Ga. 327 (9), 240 S.E. 2d 833 (1977).

243 S.E. 2d at 23.

The retrial of the sentencing portion of petitioner's case took place on May 22, 1978. At that trial, the prosecutor, seeking the death penalty, attempted to demonstrate the existence of two aggravating circumstances (Tr. -2 at 74-75).* The first aggravating circumstance with which the prosecution was concerned was the rape of the victim; the second aggravating circumstance, about which the jury in the first trial was not charged at all, was that the murder was "vile, horrible, and inhuman in that it involved torture, depravity of mind or an aggravated battery". (Tr. -2 at 75).

The direct evidence presented by the prosecution dwelled on the mutilated state of the victim's body and was heavily constituted by oral descriptions or authentication of photographs of the body, subsequently admitted into

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* Throughout this petition, references to the transcript of the lower court in the 1978 trial will be designated as ("Tr. -2 at ____)".

evidence.* On Petitioner's behalf, his sister testified (Tr. -2 at 207-223) and he also took the witness stand (Tr. -2 at 225-261). Three exhibits were introduced by Petitioner: school reports indicating that Petitioner failed every course he ever took in school and was passed only for social reasons (Tr. -2 at 211); a report from a psychiatrist of the Central State Hospital in Milledgeville, Georgia, diagnosing Petitioner as having mild mental retardation (this document had been stipulated into evidence at the special sanity hearing prior to Petitioner's first trial); and a psychiatric evaluation by a psychiatrist at The Bradley Center, Columbus, Georgia, diagnosing Petitioner as "functioning intellectually in the range of mild mental retardation".

At the close of evidence and summation, the jury was charged orally and in writing. The oral charge (Appendix E, hereto) generally instructed the jury that in determining a sentence, they were authorized to consider all circumstances in aggravation or mitigation. They were informed that they should look for specific statutory aggravating circumstances suggested by the evidence and that the presence of such circumstances could warrant a sentence of death. The judge also instructed that even if aggravating circumstances existed, a life sentence could be recommended.

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* The prosecution called ten witnesses. Six of those witnesses, whose direct testimony constituted about forty-eight pages of transcript out of a total of approximately fifty-six pages of prosecution witnesses' direct testimony, either authenticated photographs taken of the body or orally described the condition of the body. Highly detailed descriptions of the wounds were given by both the chief investigator, Bert Davis (Tr. -2 at 130, 131) and the coroner, Dr. Byron Dawson (Tr. -2 at 174-178).

The written charge (Appendix F, hereto) was presented to the jury in this way:

> "Now, ladies and gentlemen of the jury a list of those aggravating circumstances that the State contends exist in this case are listed on a piece of paper and will be out with you [the jury] in the jury room during your deliberation."

(Tr. -2 at 298). This document, entitled "Punishment Charge", did not instruct the jury that they were authorized to consider mitigating circumstances and did not say that even if aggravating circumstances were present, a life sentence could be imposed.

After deliberation, the jury returned with a sentence recommending death. Petitioner appealed the death sentence to the Supreme Court of Georgia, where the sentence was affirmed in Spraggins v. State, ____Ga.____, 252 S.E. 2d 620 (1979) (hereinafter, "Spraggins II"). Petitioner's initial writ of certiorari was granted and remanded for review in light of Godfrey v. Georgia, supra. Petitioner filed a timely written motion for full briefing and oral argument on July 1, 1980. This motion was denied and the Georgia Supreme Court reimposed the death sentence on September 24, 1980.

HOW THE FEDERAL QUESTIONS WERE RAISED

The mandatory death sentence review, which must be undertaken pursuant to statute, Ga. Code Ann. § 27-2537, by definition comprehends review of and decision on the constitutional questions raised by the facts in this case. Particularly the Georgia Supreme Court considered:

1. Whether the sentencing instructions, as provided for in Ga. Code Ann. § 27-2534.1(b) were subject to such

defects as to prevent the jury's consideration of mitigating circumstances. Spraggins II, 252 S.E. 2d at 622. Although no specific reference to federal law was made in this determination, the Georgia Supreme Court reviewed the sentencing instructions by following the reasoning in two Georgia cases, Fleming v. State, 240 Ga. 142, 240 S.E. 2d 37 (1977) and Hawes v. State, 247 Ga. 327(9), whose foundations are explicitly and indissoluby welded to constitutional principles and decisions articulated by this Court. Therefore, the Georgia Supreme Court's determination in this regard is necessarily a matter of federal law.

2. Whether in light of the evidence and circumstances of the trial, the jury's sentence of death was imposed under the "influence of passion, prejudice, or any other arbitrary factor" (Ga. Code Ann. § 27-2537(c)(1)) in such a way that it would violate the Petitioner's constitutional guarantee to a sentencing trial which is not capricious or arbitrary."

3. Whether the fact that no jury ever considered this case in light of a clearly defined statutory aggravating circumstance deprived petitioner of his Sixth Amendment rights. Because this Court explicitly remanded disposition of the sentence to the Georgia Supreme Court, for consideration in light of Godfrey v. Georgia, supra, it must be assumed that in deciding not to convene a new sentencing jury, the Georgia Supreme Court decided that petitioner's Sixth Amendment rights were not jeopardized.

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* This Court's decision in Gregg v. Georgia, 428 U.S. 153, 204-207 (1976) makes clear that his feature of Georgia's capital sentencing review scheme so protects a defendant's rights. Examination of those factors which have influenced the jury thus has a federal constitutional dimension.

REASONS FOR GRANTING THE WRIT

This Court has recognized the unique and awesome nature of the State's power to determine whether a human life should be taken or spared. Because of the absolute and irreversible impact of this determination, this Court has mandated that the death penalty may be constitutionally imposed only under procedures that ensure that the State's power to decree death is not wantonly and capriciously exercised.

Petitioner was denied the protection of those procedural safeguards declared by this Court to be constitutionally required. The sentence of death, imposed by a jury that was improperly instructed, prejudiced by inflammatory evidence and undirected by an adequately defined statutory standard, constitutes cruel and unusual punishment. Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated in these proceedings.

1. THE WRITTEN CHARGE OF THE TRIAL JUDGE EFFECTIVELY NULLIFIED THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES

A. The Written Charge of the Trial Judge Failed to Inform the Jury that Even If They Found Aggravating Circumstances, They Could Recommend a Life Sentence.

As directed by statute, the sentencing trial judge in this case provided the jury with a written charge to be taken into the jury room. Ga. Code Ann. § 27-2534.1(c).*

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* The first sentence of § 27-2534.1(c) reads:

> "The statutory instruction as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation."

This written charge sets forth two options which the jury might have selected after deliberation. The first option was stated as follows:

> If you find that there was one or more of these aggravating circumstances [listed immediately above in the charge] established beyond a reasonable doubt, you may fix punishment at death.

The second option contained in the charge was:

> If you do not find that there was one or more aggravating circumstances, then the form of your verdict would be, "We, the Jury, fix punishment at life."

Petitioner submits that by limiting the jury to these two options, the judge eliminated the possibility that the jury would consider mitigating circumstances and recommend a life sentence, even if aggravating circumstances were present.

If the five death sentence cases decided by this Court in July, 1976, a consistent theme was that state death statutes must establish a scheme that allows the jury to consider and evaluate freely all mitigating circumstances in passing sentence.* The Court's more recent decision in Lockett v. Ohio, 438 U.S. 586 (1978), affirms that principle. At various places throughout these decisions, this Court approvingly referred to the Georgia statute, Code Ann. § 27-2534.1, as exemplifying a state statute which comprehends the necessity of allowing the trier of fact to consider all mitigating circumstances.** See, e.g., Lockett v. Ohio, 538 U.S. at 606; Jurek v. Texas, 428 U.S. at 271.

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* Gregg v. Georgia, 428 U.S. 153; Proffitt v. Florida, 428 U.S. 242; Jurek v. Texas, 428 U.S. 262; Woodson v. North Carolina, 428 U.S. 280; Roberts v. Louisiana, 428 U.S. 325.

** Section 27-2534.1(b) reads:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence....

In several decisions, the Georgia Supreme Court has considered the statute as applied by the lower Georgia courts and has set guidelines intended to ensure that the jury will consider mitigating circumstances and fashion their sentences accordingly. For instance, in Fleming v. State, 240 Ga. 142, 240 S.E. 2d 37 (1977), the Georgia Supreme Court overturned a death sentence on the grounds that the trial judge failed to inform the jury that "they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance". 240 S.E. 2d at 40. Explaining its decision in terms of an obligation to permit consideration of mitigating circumstances, the Georgia Supreme Court wrote:

> Our system for deciding whether a death sentence is to be given requires the jury to consider two issues in the sentencing phase. First, the jury must consider if the state has proven the existence of at least one statutory aggravating circumstance (Code Ann. § 27-2534.1(b)(1-10)), beyond reasonable doubt. Second, if one of these circumstances is found, the jury must then consider the mitigating and aggravating circumstances relevant to the defendant and determine whether the death penalty is appropriate in this case.

240 S.E. 2d at 40-41. It is thus clearly the opinion of the Georgia Supreme Court that unless the jury is specifically informed that it may impose a sentence for life even if a statutory aggravating circumstance is present, effective consideration of mitigating circumstances will be foreclosed. See also, Hawes v. State, 240 Ga. 327, 240 S.E. 2d 833 (1977). Such an automatic nugatory rendering of mitigating circumstances would of course rise to unconstitutional dimensions.

As noted in the factual summary above, the first Georgia Supreme Court decision involving the Petitioner followed the Fleming and Hawes decisions and set aside the

death sentence. In contrast, in the decision from which this petition arises, the Georgia Supreme Court specifically found that the Fleming-Hawes infirmities did not obtain. Spraggins II, 252 S.E. 2d at 622. Presumably relying upon parts of the judge's oral charge (Appendix D, hereto), the Georgia Supreme Court obviously believed that the jury was sufficiently informed that a death sentence was not inevitably to derive from a finding of aggravating circumstance. Petitioner submits that in light of the written charge actually carried by the jury into its final deliberations, the Georgia Supreme Court was incorrect in its conclusion that the oral charge was sufficiently salient to instruct the jury on the Fleming-Hawes constitutional issue.

Petitioner appreciates that the jury deliberation process is largely inscrutable. For the most part, the devices which sway juries or the tactics which pass beyond them are matters of mere speculation to observers. Nevertheless, the impact of a written charge carried into the jury room as a tangible item of authoritative source cannot rationally be minimized. Clearly, such impact is pervasive. To assume that several sentences in an earlier oral charge will cause the jury to deviate from the instructions of the written word is both naive and, more importantly, improper. Petitioner submits that the jury which sentenced him to death was effectively foreclosed from consideration of mitigating circumstances because the judge's written charge failed to inform them that even if they first found an aggravating circumstance, a life sentence could be imposed. Accordingly, petitioner was denied his constitutional right to due process of law.

Moreover, because the written charge overshadowed the oral charge and firmly guided the jury, the statute, in the understanding of the jury, would tend to acquire a mandatory character. For, once the jury found an aggravating circumstance, there was, under the judge's written instructions, no explicit option other than death; and although the language in the written charge is technically permissive (the charge says "may recommend"), the jury members are not trained in law and their interpretation may not be so refined. To the extent that this written charge turned the Georgia statute into a mandatory death statute, petitioner's constitutional rights were violated. See, e.g., Woodson v. North Carolina, 428 U.S. 280 (1976).

B. The Written Charge of the Trial Judge Failed to Instruct the Jury that They Could Consider Mitigating Circumstances.

The judge's written charge, discussed above, also contained the following instruction concerning the scope of the jury's inquiry:

> I charge you that you may look to see if there was any one or more of the following aggravating circumstances:
>
> (1) The offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to wit: the rape of Frances Coe.
>
> (2) The offense of Murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

The written charge did not advise the jury that they could consider any mitigating circumstances.

With respect to the absence in the written charge of any reference to mitigating circumstances, the Georgia

Supreme Court evidently believed, as suggested above, that the judge's oral charge regarding mitigating circumstances satisfied the constitutional requirements. If the Georgia Supreme Court did not so believe, there is no way to reconcile the decision in petitioner's case with the holding in Hawes v. State. Petitioner accordingly reiterates the points raised above regarding the respective influence on the jury of an oral and a written charge and asks the Court to consider whether or not the sentencing jury was ultimately given sufficient notice and opportunity to consider mitigating circumstances.

In addition, the petitioner submits that the written charge was improper and unconstitutional because by its application, it violated the Georgia statute, found lawful on its face by this Court in Gregg, which calls for an identity of content in the oral and written charges. Ga. Code Ann. § 27-2534.1(c). That section requires that the judge in the sentencing trial provide the jury "in charge and in writing" (emphasis added) with "the statutory instructions as determined by the trial judge to be warranted by the evidence".* The statutory language does not leave room for a significant disparity between the oral and written charges, particularly where the actual written charge omits any mention of mitigating circumstances. Such disparity could only serve to confuse the jury as to which factors it is required to consider, and thus confounds so salutary in Gregg. Petitioner therefore submits that the exact terms of the statute which support its constitutionality by unqualifiedly guaranteeing consideration of mitigating

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* The "statutory instructions" referred to in § 27-2534.1(c) have already been quoted in the petition, at p. 3. They are that "he [the judge] shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances...."

circumstances, have been nullified in application by the disparity in the judge's oral and written charges.

2. THE GEORGIA STATUTE, AS APPLIED IN THIS CASE, DID NOT INSURE AGAINST A CAPRICIOUS AND ARBITRARY DETERMINATION RESPECTING PETITIONER'S SENTENCE.

A. The Sentencing Jury Considered Irrelevant, Prejudicial and Inflammatory Information Without the Guidance of Clear Judicial Standards.

In Gregg, this Court emphasized that when a human life is at stake there is a critical need to provide a jury with guidance, and to ensure that relevant information is properly considered while irrelevant prejudicial information is excluded:

> Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. at 189. The Court cautioned that "the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury"; the jury must be given guidance and direction in reaching its determination. Gregg v. Georgia, 428 U.S. at 192.

Petitioner was sentenced to death in proceedings that wholly failed to satisfy the concerns voiced in Furman and Gregg, thereby creating a grave risk that the sentence was imposed in an arbitrary and capricious manner. The jury that sentenced petitioner was permitted to consider inflammatory evidence, and improper, prejudicial statements, without any standards to

limit or direct its use of this information. Over the objection of defense counsel, the sentencing court allowed the prosecution to introduce into evidence and to display to the jury several photographs that graphically depicted the wounds suffered by the victim. (Tr. -2 at 133-134, 196-200). There was extensive testimony in the record as to the nature of the crime and the condition of the body (Tr. -2 at 131-132). The pictures were, therefore, not necessary to depict the crime and could serve no legitimate purpose. Rather, they could have served only to evoke feelings of revulsion and contempt in jurors unaccustomed to the spectacle of murder victims. The introduction of this evidence created a significant danger that the jury would be unduly prejudiced and incapable of reaching a reasoned decision.

Of further prejudicial impact were various comments and statements made by the prosecutor. Mr. Lee examined the petitioner on the issue of prior convictions as follows:

Q. So you are the kind of guy who goes to trial when you are not guilty but gets found guilty, isn't that right?

A. Yes, but if you can recall in this case right here they never give me no chance to say whether I was or wasn't.

Q. But you were found guilty?

A. They gave me a year.

Q. You didn't serve a year, did you?

A. I would have.

Q. They cut you loose -- how long did you serve?

A. Four months.

Q. Four months isn't a year, is it?

A. Well, that ain't my fault.

Q. They always turn you loose, don't they, when you go in?

A. They never have turned me loose every time I was up there. I done my time.

(Tr. -2 at 242-243). The prosecutor's questions undoubtedly achieved the intended purpose -- to alert the jury to the possibility that unless executed, petitioner would be "cut loose". Not only was the implication unwarranted; Georgia law specifically prohibits the prosecutor from making this argument to the jury. Ga. Code Ann. § 27-2206 (1978). In further disregard of this prohibition in his closing argument the prosecutor stated:

> He has been in jail so many times he can't even remember the number of them. Every time he gets out and goes and does something else. You want that to happen here. How would you feel being at your house one night looking out your window and seeing Eddie Spraggins walking up to your front door? If that wouldn't make cold terror run through your heart, I want to know what would. This man needs to be put where he can't do anything to anybody else again and the only way, the only way to be sure of that is recommend the death penalty.

(Tr. -2 at 281-282). At this point defense counsel moved for a mistrial; the trial court denied the motion, instructing the jury not to consider whether the defendant would be considered for parole. Obviously, the effect of this admonition must be assumed to have been negligible.

The impact of the prosecutor's statements, in conjunction with the introduction of the inflammatory pictures, was to arouse the jury's fear and prejudice. This appeal to the juror's sense of terror and outrage prevented a reasoned determination, based on relevant evidence and considerations.

The risk of an arbitrary and capricious decision was, thus, extremely grave; this risk was augumented by the judge's failure to provide the jury with standards to guide its use of the information relevant to the imposition of the sentence.

The judge instructed the jury on the use of the evidence as follows:

> In reaching your determination, you are authorized to consider all of the evidence received by you in open court.
>
> You are authorized to consider all the facts and circumstances of the case.

(Tr. -2 at 296). The judge's abandonment of his duty to provide guidance left the jury free to exercise its unbridled discretion in sentencing petitioner to death.

B. Automatic Sentence Review by the Supreme Court of Georgia Was Inadequate to Protect Against the Capricious, Arbitrary and Unconstitutional Imposition of Petitioner's Death Sentence.

In upholding Georgia's death penalty statute in Gregg, this Court focused on the automatic appeal to the Georgia Supreme Court as an important additional safeguard against the arbitrary and capricious imposition of the death penalty. 428 U.S. at 198, 204-206. Reliance on the automatic review process is misplaced; the Georgia Supreme Court's review of petitioner's death sentence did not and could not ensure that jury discretion was controlled by clear and objective standards so as to eliminate the risk of arbitrary and capricious action.

The Georgia Supreme Court is required under the sentence review statute to consider whether the sentence was imposed under the influence of passion or prejudice. Ga. Code Ann. § 27-2537 (c)(1). In one conclusory statement, without the basis for its conclusion, the Georgia Supreme Court dismissed this possibility. 252 S.E. 2d at 262.

The Court's citation to similar cases in which the death penalty was imposed to support its imposition in this case is of no value in protecting against its random use.

The cases cited by the Court are similar in that they involve murder convictions; presumably in any case in which the defendant is convicted of murder the cases cited would support imposition of a death sentence. See id. at 623.

It is apparent from the summary nature of the Georgia Supreme Court's opinion in this case, that the automatic review afforded a defendant under this statute provides only the illusion of protection against arbitrary and capricious imposition of the death penalty.

3. NO JURY HAS EVER VOTED TO SENTENCE PETITIONER ON THE BASIS OF A CLEARLY DEFINED STATUTORY AGGRAVATING CIRCUMSTANCE, THEREFORE DEPRIVING HIM OF HIS SIXTH AMENDMENT RIGHTS

A. The Georgia Supreme Court Improperly Acted as a Sentencing Agent by Reimposing the Death Sentence After Redefining the Statute.

With respect to petitioner's first petition for a writ of certiorari, the Court remanded his case "for further consideration in light of Godfrey v. Georgia", but did not instruct the Georgia Supreme Court to put the matter before a newly convened sentencing jury. Mr. Justice Marshall's concurrence in Godfrey did suggest that a trial jury should be called:

> "[I]t is not enough for a reviewing court to apply a narrowing construction to otherwise ambigious statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards."

Godfrey v. Georgia, supra, 64 L. Ed. 2d at 411 (emphasis in original). Mr. Justice Stewart's opinion for the Godfrey plurality, on the other hand, could be read to imply -- though it did not hold* -- that if "the Georgia Supreme Court can be

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* The plurality insisted that "if a State wishes to authorize the capital punishment... [i]t must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, supra, 64 L. Ed. 2d at 406.

said to have applied a constitutional construction" of subsection (b)(7), Godfrey v. Georgia, supra, 64 L. Ed. 2d at 409, any deficiency at the trial jury level could be overcome.

On remand in this case, the Georgia Supreme Court, sua sponte decided against convening a new sentencing jury and further refused to take briefs or oral argument on any matter regarding petitioner's case. Simply holding that petitioner's

> "jury was authorized to find, consistently with the United States Supreme Court's holding in Godfrey, supra, that beyond a reasonable doubt that [sic] the appellant's murder of the victim was outrageously or wantonly vile, horrible or inhuman."

Spraggins v. State, supra (slip opinion, 4) (emphasis added), the Georgia Supreme Court reimposed the death sentence.

That disposition of the remand was improper, however, since it effectively deprived petitioner of a trial by a jury that was guided in the meaning of subsection (b)(7) of the Georgia statute. That subsection permits the jury to recommend a death sentence if they find that the murder was aggravated in that it was:

> "outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim."

While it is true that in light of Godfrey and subsequent decisions by the Georgia Supreme Court, subsection (b)(7) has acquired some shape and texture, no trial jury has had the opportunity to consider petitioner's case in that crafted posture. Thus, it is "impossible for [the Georgia Supreme Court] to say whether a particular jury... so exercised its discretion", Godfrey v. Georgia, supra, 64 L. Ed. 2d at 912,

and applied a constitutionally limited interpretation to (b)(7). Nothing in the sentencing instructions given petitioner's jury

> "implie[d] any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible or inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed."

Godfrey v. Georgia, supra, 64 L. Ed. 2d at 406.

This Court has repeatedly held that no criminal sentence may be based merely on appellate speculation that a jury, faced with two alternative theories, one of which is unconstitutional, might have acted on a constitutional basis.* This principle has been observed in death cases, where the Court has insisted that all "doubts... should be resolved in favor of the accused" Andres v. United States, 333 U.S. 740, 752 (1948); accord, Calton v. Utah, 130 U.S. 83, 86-87 (1889). Without assurance that the jury which sentenced the petitioner did so on the basis of a statute carefully fashioned to prevent arbitrary and capricious decisions, the petitioner's sentence to death should not have been reimposed.**

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* Stromberg v. California, 283 U.S. 359, 268 (1931); Williams v. North Carolina, 317 U.S. 287, 291-93 (1942); Cramer v. United States, 325 U.S. 1, 36 n.45 (1945); Terminiello v. Chicago, 337 U.S. 1, 5-6 (1949); Yates v. United States, 354 U.S. 298, 311-12 (1957); Gregory v. Chicago, 394 U.S. 111, 113 (1969); Street v. New York, 394 U.S. 576, 586-87 (1969); Bachellar v. Maryland, 397 U.S. 564, 569-71 (1970); Eaton v. Tulsa, 415 U.S. 697, 698-99 (1974) (per curiam); Sandstrom v. Montana, 442 U.S. 510, 526 (1979); Chiarella v. United States, __U.S.__, 63 L. Ed. 2d 348, 362 n. 21 (1980)

** The Georgia Supreme Court, acting on its own, could not constitutionally reimpose such a sentence simply from its own review of the trial record. "To conform to due process of law, petitione[r] [was] entitled to have the validity of [his] conviction appraised on consideration of the case as it was tried and as the issues were determined in the trial court". Cole v. Arkansas, 333 U.S. 196, 201 (1948); accord, Chiarella v. United States, supra, 63 L. Ed. 2d at 363; Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965). This "fundamental principl[e] of procedural fairness appl[ies]

(cont'd)

B. The Jury Which Sentenced Petitioner Was Given License to Apply the Statute Subjectively and Capriciously

In Gregg v. Georgia, 428 U.S. at 201, this Court considered the question of whether Georgia's seventh statutory aggravating circumstance was "so broad that capital punishment could be imposed in any murder case." The Court, obviously expecting future definition of this provision, concluded that:

> It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But the language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.

Unfortunately, contrary to the Court's expectations, no such definition was forthcoming from the Georgia Supreme Court until Godfrey v. Georgia, supra. Before that decision, juries, virtually unguided by the courts of Georgia,* have found that the seventh aggravating circumstance obtained in cases as diverse as Banks v. State, 237 Ga. 325, 227 S.E. 2d 380, 382 (1976), cert. denied, 430 U.S. 975 (1977), where the firing of two gunshots into a victim found to constitute torture and depravity of mind,** and Thomas v. State, 240 Ga. 393, 242 S.E. 2d 1 (1977), where the victim was shot five times in the head, beaten with a shovel and hammer and buried alive.

(footnote cont'd)

with no less force at the penalty phase of a trial in a capital case than... in the guilt-determining phase of any criminal trial. Cf. Gardner v. Florida, 430 U.S. 349 (1977)", Presnell v. Georgia, 439 U.S. 14, 16 (1978). The Georgia Supreme Court's attempt to reassess petitioner's sentencing issues, relying only upon a cold record, and in absence of statutory authority, plainly denied petitioner the due process of law.

* The sentencing trial judge in petitioner's case made no attempt to define the seventh statutory aggravating circumstance in his instructions to the jury. (Appendix E)

** Apparently, where death is not simultaneous with the first intrusion on the victim's body, juries in Georgia are free to conclude that torture was entailed. See also, Morgan v. Georgia, 241 Ga. 485, 246 S.E. 2d 198 (1978), where one gunshot fired into the head of the victim was found to constitute the seventh statutory aggravating circumstance.

Besides its objectionable breadth, Georgia's seventh aggravating circumstance, unrefined as it was when applied by petitioner's jury, put a premium on the introduction of inflammatory evidence. Gruesome and detailed testimony accompanied by flagrant exhibits acquired a heightened significance inappropriate to the objective and rational judgment which must inform the decision of whether a human life should be taken or spared. For instance, as discussed above, the admission into evidence of photographs which graphically depicted former testimony had no objective value; its only purpose was to elicit in the jury a visceral feeling of repulsion responsive to such vague standards as "wanton" and "vile".* Because this statutory standard, in its then undefined state, invited the death sentence as a function of inflammatory evidence, petitioner submits that its application was unconstitutional.

4. PETITIONER WAS SENTENCED TO DEATH IN VIOLATION OF THE FIFTH AMENDMENT BAN AGAINST DOUBLE JEOPARDY AND IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW

Under Georgia law the judge at the presentencing hearing is required to instruct the jury to consider any of the statutory aggravating circumstances which may be supported

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* Indeed the trial judge admitted as much when he overruled the objections of petitioner's counsel to admission of the photographs. The judge said:

> Further, the state contends that murder was outrageous and wanton and vile, horrible, depravity of mind on the part of the defendant or aggravated battery on the victim, so, I think, it is necessary these pictures be viewed by the jury in order that they can make up their minds as to what sentence this defendant is to receive upon the sentencing phase of the trial.

(Tr. -2 at 135).

by the evidence. Ga. Code Ann. § 27-2534.1(b) and (c). Georgia law also provides "that only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible" at the presentencing hearing. Ga. Code Ann. § 27-2503(a) (emphasis added). In petitioner's first sentencing hearing, the judge instructed the jury that it could sentence petitioner to death if it found that the murder was committed while the defendant was engaged in the commission of the capital offense of rape. This is the only statutory aggravating circumstance which the judge instructed the jury to consider, see Ga. Code Ann. § 27-2534.1(b); the Georgia Supreme Court held that "[t]his was the only aggravating circumstance as to which the defendant had been put on notice." Spraggins I, 243 S.E. 2d 20, 23 (1978) (citing Ga. Code Ann. § 27-2503).

Following the Georgia Supreme Court's decision setting aside the death sentence and ordering a new sentencing trial, the prosecution submitted its sentencing case to the second jury on the theory that two aggravating circumstances were present in the case -- the one that was charged in the first trial and the additional circumstance that the murder was outrageously or wantonly vile, horrible or inhuman. See, Ga. Code Ann. § 27-2534.1(b)(7). This second jury based its decision to impose the death sentence on its finding bevond a reasonable doubt that "[t]he offense of murder was outrageous, wanton, vile and horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, and aggravated battery to the victim." (Tr. -2 at 304) See, Ga.

Code Ann. ¶ 27-2534.1(b)(7) and (c). The second sentencing jury did not find that the murder was committed while the offender was engaged in the commission of rape.

This Court has recognized that "[e]ven if the first trial is not completed, a second prosecution may be grossly unfair" because successive prosecutions increase the emotional burden on the defendant and may significantly enhance the risk of conviction by allowing the prosecution to refine its proof. Arizona v. Washington, 434 U.S. 497, 503-504, and note 14 (1978). "Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." Id. at 505. Although the issue at the second trial was punishment, not guilt, petitioner was, plainly, placed in jeopardy of life. Had the second jury been limited to consideration of the statutory aggravating circumstance charged in the first trial, it could not have sentenced petitioner to death on the basis of its stated findings.

Petitioner submits that it was a violation of the Fifth Amendment's ban against double jeopardy for the prosecution to present its sentencing case to the second jury based on a statutory aggravating circumstance that had not been established by the evidence in the first sentencing trial. If the evidence presented at the first sentencing hearing was inadequate to require the judge to charge the jury on the additional aggravating circumstance, the prosecution should not be entitled to a second chance to prove beyond a reasonable doubt the existence of this aggravating factor. See, generally, Burks v. United States, 437 U.S. 1 (1977); Price v. Georgia, 398 U.S. 323 (1970); Green v. United States, 355 U.S. 184 (1957).

Petitioner also submits that the proceedings in which he was sentenced to death were fundamentally unfair and denied him due process of law. The prosecution gained an unfair advantage through the opportunity to present its case to a second jury with an additional theory to support imposition of the death sentence. It is impossible to be certain that the jury's decision to impose death was not the result of its focusing on which of the circumstances was proved by the evidence rather than on whether either was proved beyond a reasonable doubt. See generally, Price v. Georgia, 398 U.S. at 331. The prejudice to petitioner is clear since the second jury based its imposition of the death sentence on the broad and undefined circumstance, rather than on the narrowly defined circumstance that served as the basis for the first death sentence.

Finally, the second sentencing trial denied petitioner the procedural protection recognized by Georgia law to be due a defendant in a death penalty case. As the Georgia Supreme Court recognized in petitioner's first appeal, the only aggravating circumstance as to which petitioner had been put on notice, as required by state law, was that charged in the first trial. Spraggins I, 243 S.E. 2d at 23; see, Ga. Code Ann. §§ 27-2503, 27-2534.1(b). Since the notice to which petitioner is entitled must precede his trial, no subsequent notice was adequate, under established procedure, to permit the prosecution to expand its case. Ga. Code Ann. § 27-2503; Moss v. Georgia, 144 Ga. App. 226, 240 S.E. 2d 773 (Ct. App. 1977). The jury's decision to impose the death penalty was, therefore, unlawful.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Supreme Court.

Respectfully submitted,

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Exhibit A

In the Supreme Court of Georgia

Decided: SEP 24 1980

34193. DAVIS v. STATE
34289. SPRAGGINS v. STATE

BOWLES, Justice.

The United States Supreme Court vacated the death sentences in the companion cases of Davis v. State, 242 Ga. 901 (242 SE2d 443) (1979) and Spraggins v. State, 243 Ga. 73 (252 SE2d 620) (1979) and remanded both cases for further consideration in light of Godfrey v. Georgia, 446 U . S. _____ (1980), Davis v. Georgia, ____U. S. _____ # 78-6891 (May 27, 1980), Spraggins v. Georgia, ____ U. S. _____ # 78-5032 (May 27, 1980).

Pursuant to the mandate of the Supreme Court of the United States we have considered both appellant Spraggins' sentence of death which rests upon Code Ann. § 27-2534.1 (b)(7) and Davis' sentence of death which rests partially upon Code Ann. § 27-2534.1 (b)(7).[1/] We find material differences between Godfrey and the

1/ While in Spraggins v. State the jury found as the sole aggravating circumstance Code Ann. § 27-2534.1(b)(7), in Davis v. State the jury found two aggravating circumstances, Code Ann. §27-2534.1 (b)(2) and Code Ann. § 27-2534.1(b)(7). In Godfrey, the court was concerned with a sentence of death resting exclusively on Code Ann. § 27-2534.1(b)(7). Godfrey v. Georgia, 446 U. S. _____ (1980). Therefore, under our decisions, the death penalty in Davis v. State, may be upheld upon Code Ann. § 27-2534.1(b)(2). Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Burger v. State 245 Ga. 458 (265 SE2d 296) (1980). Dampier v. State, addendum, supra.

cases under review which distinguish this murder from the murder in Godfrey and from other "ordinary murders" for which the death penalty is not appropriate. See generally, Hance v. State, _____ Ga. _____ (____SE2d____) Case No. 26012, decided June 24, 1980. Dampier v. State, addendum, 245 Ga. 882 (____SE2d_____) (1980.

Unlike the murder in Godfrey, death was not instantaneous, the victim was not related to either defendant, and the victim was in no way threatening nor hostile to the defendants. Both defendants had planned to rob the victim. Thereafter the defendants fled and made every effort to conceal their crimes.

Code Ann. § 27-2534.1(b)(7) provides in pertinent part: "The offense of murder...was outrageously vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. In Davis v. State, supra, and Spraggins v. State, supra, we held that the jury's finding beyond a reasonable doubt that the "murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind of the defendant or aggravated battery to the victim" was supported by the evidence.

The evidence shows that the victim was raped and killed as part of a robbery scheme. The victim died from loss of blood.

She had been beaten about the face and had been repeatedly stabbed, slashed and cut. Her throat was cut and the trachea was almost severed. She had been partially disembowelled. Death was not instantaneous but was prolonged. Spraggins v. State, 240 Ga. 759 (243 SE2d 20) (1978).

The victim was found with her sweater open, her slip pulled up and her pantyhose and panties pulled down. Forensic evidence established that there could have been manipulation of the victim's sexual organs. Bruises were present on her thigh and near the vaginal opening. There was a tear in the vaginal wall and hemorrhaging around the urethra.

Torture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, supra; Hance v. State, supra. Serious sexual abuse may be found to constitute serious physical abuse, House v. State, 232 Ga. 140 (205 SE2d 217) (1974); Hance v. State, supra. A defendant who tortures the victim before killing the victim can be found to have a depraved mind.

A defendant who mutilates or seriously disfigures the victim's body after death, or who commits a sex act upon the victim's body

after death may be found to have a depraved mind and such acts would be sufficient to show depravity of mind of the defendant within the meaning of Code Ann. § 27-2534.1(b)(7). Hance v. State, supra.

Accordingly, this court holds that juries in both Spraggins v. State, supra, and Davis v. State, supra, were authorized to find, consistently with the United States Supreme Court's holding in Godfrey, that beyond a reasonable doubt the murder of the victim was of the type universally condemned by civilized society as "outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." See Burger v. State 245 Ga. 458 (265 SE2d 296) (1980); Stevens v. State, 245 Ga. 583 (266 SE2d 194) (1980).

Judgment imposing the death penalty in each case reaffirmed. All the Justices concur.

Exhibit B

wife, and in ordering him to pay an indebtedness for a stove purchased for the wife's benefit.

This court will not control the discretion of the trial judge in awarding temporary alimony and attorney fees unless there is a manifest abuse of discretion. *Johnson v. Johnson*, 236 Ga. 647, 225 S.E.2d 36 (1976); *Wilbanks v. Wilbanks*, supra. After reviewing the record of the hearing, we find evidence to support the award of temporary alimony to the wife, and no abuse of discretion.

Judgment affirmed.

All the Justices concur.

KEY NUMBER SYSTEM

SPRAGGINS

v.

The STATE.

No. 34289.

Supreme Court of Georgia.

Argued Jan. 8, 1979.

Decided Feb. 6, 1979.

Following remand for new trial on issue of punishment to be imposed following conviction for rape and murder, 240 Ga. 327, 240 S.E.2d 833, the Meriwether Superior Court, Jackson, J., entered death sentence on jury verdict, and defendant appealed. The Supreme Court, Bowles, J., held that: (1) closing argument by district attorney, that defendant might not be required to suffer full penalty imposed by court or jury because pardon, parole or clemency might be granted, was within permissible range afforded to prosecuting attorney who is seeking death penalty; (2) written list of aggravating circumstances was properly given to jury to be carried with them into jury room; (3) verdict was not improperly prepared in open court under instructions of district attorney; (4) record demonstrated that sentence of death was not imposed under influence of passion, prejudice or any other arbitrary factor; (5) evidence supported jury's finding of aggravated circumstance, and (6) sentence of death was not excessive or disproportionate considering both crime and defendant.

Affirmed.

1. Criminal Law ⇐723(1)

Closing argument by district attorney in murder-rape prosecution, that defendant might not be required to suffer full penalty imposed by court or jury because pardon, parole or clemency might be granted, was within permissible range afforded to prosecuting attorney who is seeking death penalty. Code, § 27-2206.

2. Criminal Law ⇐730(14)

Even if closing argument by district attorney in murder-rape prosecution, that defendant might not be required to suffer full penalty imposed by court or jury because pardon, parole or clemency might be granted, was improper, such impropriety was cured by trial judge's corrective instruction. Code, § 27-2206.

3. Criminal Law ⇐858(1)

In murder-rape prosecution, written list of aggravating circumstances was properly given to jury to be carried with them into jury room. Code, § 27-2534.1(c).

4. Criminal Law ⇐857(1)

Verdict in murder-rape prosecution was not improperly prepared in open court under instructions of district attorney, where foreman stated that the verdict had been reached in jury room, where, because verdict form had not been completed in accordance with court's instructions, district attorney handed verdict form back to foreman and instructed her to strike out the inapplicable verdict, where the court reiterated such instruction to the foreman, and where the jurors were polled and each answered that verdict was his own, freely and voluntarily given.

5. Criminal Law ⇐768(1)

Jury instruction in murder-rape prosecution, that "It is not wise to immediately express a determination or insist upon a certain verdict," did not encroach upon the jury's deliberation function.

6. Homicide ⇐354

Record in murder-rape prosecution demonstrated that sentence of death imposed upon defendant was not imposed under influence of passion, prejudice or any other arbitrary factor. Code, § 27-2537(c)(1).

7. Homicide ⇐354

Evidence in murder-rape prosecution in which death penalty was imposed supported jury's finding of an aggravating circumstance, viz., that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind on part of defendant or aggravated battery to the victim.

8. Criminal Law ⇐193

No double jeopardy violations occurred, in resentencing trial on convictions of rape and murder, by submission to jury of list of aggravating circumstances to be considered.

9. Criminal Law ⇐1206(2)

Sentence of death imposed in murder-rape prosecution was not excessive or disproportionate considering both crime and defendant. Code, § 27-2537(c)(3).

A. Vernon Belcher, Greenville, for appellant.

Arthur K. Bolton, Atty. Gen., John W. Dunsmore, Jr., Asst. Atty. Gen., William F. Lee, Jr., Dist. Atty., for appellee.

BOWLES, Justice.

The appellant, Eddie Spraggins, was indicted by a grand jury in Meriwether County for the January 31, 1977, rape and murder of Frances Coe. He was tried by a jury and found guilty of both offenses.

In *Spraggins v. State*, 240 Ga. 739, 243 S.E.2d 20 (1978), appellant's conviction and life sentence for rape were affirmed. However, because the court in its sentencing instructions failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance (*Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977)); and failed to inform the jury that they were authorized to consider mitigating circumstances, as required by Code Ann. §§ 27-2534.1(b) and 27-2534.1(c), (*Hawes v. State*, 240 Ga. 327(9), 240 S.E.2d 833 (1977)), appellant's sentence of death for murder was reversed and a new trial ordered on the issue of punishment.

Upon resentencing, the jury found that the murder was "outrageously and wantonly vile, horrible, and inhuman in that it involved torture and depravity of mind on the part of the defendant, or an aggravated battery to the victim." Code Ann. § 27-2534.1(b)(7). A verdict was returned for the death penalty and appellant was sentenced to death.

The case is here on direct appeal and for mandatory review of the death sentence imposed. Code Ann. § 27-2537. The facts surrounding the murder and rape of Frances Coe are set out in *Spraggins v. State*, supra, and its companion case, *Davis v. State*, 240 Ga. 763, 243 S.E.2d 12 (1978).

1. In his first enumeration of error, appellant complains that the trial court erred in denying his motion for mistrial, made after the district attorney's request for the death penalty in closing argument. Appellant argues that the district attorney's statement violated Code Ann. § 27-2206, which forbids a prosecutor from arguing that a defendant may not be required to suffer the full penalty imposed by the court or jury, because pardon, parole or clemency of any nature may be granted. Although the trial judge overruled appellant's motion for mistrial, he did instruct the jury not to consider whether, if given a life sentence, appellant might be paroled.

[1] We have reviewed the closing argument made by the district attorney and find it to be within the permissible range afforded to a prosecuting attorney who is seeking

the death penalty. *Redd v. State*, 242 Ga. ——, 252 S.E.2d 383 (1979); *Mason v. State*, 236 Ga. 46, 222 S.E.2d 339 (1976); *Tamplin v. State*, 235 Ga. 20(4), 218 S.E.2d 779 (1975).

[2] Even assuming arguendo that the argument was improper, it was cured by the judge's corrective instruction. *Pryor v. State*, 238 Ga. 698(7), 234 S.E.2d 918 (1977). The trial judge did not err in refusing to grant appellant's motion for mistrial.

[3] 2. Appellant complains that it was error to give to the jury a list of aggravating circumstances put forth by the State to be carried with them into the jury room.

Code Ann. § 27-2534.1(c) requires that the trial judge give the statutory instructions warranted by the evidence to the jury in its charge and in writing. There was evidence to support the aggravating circumstances given to the jury in the charge and in writing. *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976); *Douthit v. State*, 239 Ga. 81(6), 235 S.E.2d 493 (1977). As the law requires that the written list of aggravating circumstances as charged by the court be given to the jury for use in its deliberations, there is no merit to appellant's second argument. The form given to the jury in this case complied with the law and conformed to the evidence.

[4] 3. Appellant complains that the jury prepared its verdict in open court under the instructions of the district attorney.

A review of the transcript shows that the jury reached its verdict in the jury room. The foreman announced, in open court, that a verdict had been reached. Because the verdict form, when handed to the district attorney, had not been completed in accordance with the court's earlier instruction, the district attorney handed the form back to the foreman, and instructed her to strike out one of the two verdicts which did not apply. The court reiterated this instruction to the foreman. No objection was made by appellant.

We find no error. The foreman stated that the verdict had been reached in the jury room. The jurors were polled, and each answered that the verdict was his own, freely and voluntarily given. No harm is shown to have resulted from the instruction given.

Appellant's third enumeration of error is without merit.

[5] 4. Appellant complains that the trial court infringed on the jury's exclusive authority by instructing that, "It is not wise to immediately express a determination or insist upon a certain verdict." We do not agree with appellant's contention.

The court's instruction did not encroach on the jury's deliberation function. Appellant's fourth enumeration of error has no merit.

[6] 5. Sentence Review. Our sentence review has included consideration of the aggravating circumstances found by the jury and the evidence introduced in court concerning the crime and the defendant. After a thorough review of the record and transcript, we conclude that the sentence of death imposed on Eddie Spraggins was not imposed under the influence of passion, prejudice or any other arbitrary factor. Code Ann. § 27-2537(c)(1).

[7, 8] The evidence supports the jury's finding of an aggravating circumstance, namely that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind on the part of the defendant or an aggravated battery to the victim. No double jeopardy violations occurred in the court's submission to the jury of the list of aggravating circumstances to be considered on resentencing. *Redd v. State*, supra.

We have reviewed the instructions given by the trial judge on resentencing and find that they are not subject to the defects dealt with in our decisions in *Fleming v. State*, supra, and *Hawes v. State*, supra.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find the cases listed in the

appendix support affirmance of the death penalty.

[9] Eddie Spraggins' sentence to death for murder is not excessive or disproportionate considering both the crime and the defendant. Code Ann. § 27-2537(c)(3). The verdict is factually supported.

Judgment affirmed.

All the Justices concur.

APPENDIX

House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974); *Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974); *Chenault v. State*, 234 Ga. 216, 215 S.E.2d 223 (1975); *Smith v. State*, 236 Ga. 12, 222 S.E.2d 308 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248 (1976); *Coleman v. State*, 237 Ga. 84, 226 S.E.2d 911 (1976); *Isaacs v. State*, 237 Ga. 105, 226 S.E.2d 922 (1976); *Dungee v. State*, 237 Ga. 218, 227 S.E.2d 746 (1976); *Banks v. State*, 237 Ga. 325, 227 S.E.2d 380 (1976); *Young v. State*, 239 Ga. 53, 236 S.E.2d 1 (1977); *Gaddis v. State*, 239 Ga. 238, 236 S.E.2d 594 (1977); *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977); *Bowden v. State*, 239 Ga. 821, 238 S.E.2d 906 (1977); *Westbrook v. State*, 242 Ga. 151, 249 S.E.2d 524 (1978); *Finney v. State*, 242 Ga. 582, 250 S.E.2d 338 (1978); *Davis v. State*, 242 Ga. 901, 252 S.E.2d 443 (1979).

WANSOR
v.
GEORGE HANTSCHO COMPANY, INC. et al.

No. 34453.

Supreme Court of Georgia.

Argued Jan. 16, 1979.

Decided Feb. 6, 1979.

In case involving question certified from United States Court of Appeals, Fifth Circuit, the Supreme Court, Undercofler, P. J., held that where product was manufactured in 1960-61, product was purchased and installed in 1961, Georgia Legislature amended statute in 1968 to overcome privity limitations on tort recoveries, product caused injury to individual in 1971 due to product's alleged defective condition, doctrine of strict liability in tort did not apply to product, since to apply 1968 statute, which created a new cause of action in Georgia applicable to manufacturer of any personal property sold as new property, to product sold in 1961 would violate applicable statute forbidding retrospective application of laws.

Certified question answered in negative.

Products Liability ⇐2

Where product was manufactured in 1960-61, product was purchased and installed in 1961, Georgia Legislature amended statute in 1968 to overcome privity limitations on tort recoveries, product caused injury to individual in 1971 due to product's alleged defective condition, doctrine of strict liability in tort did not apply to product, since to apply 1968 statute, which created a new cause of action in Georgia applicable to manufacturer of any personal property sold as new property, to product sold in 1961 would violate applicable statute forbidding retrospective application of laws. Code, §§ 102-104, 105-106.

Johnson, Ward, Stanfield, Lanham & Carr, Cullen M. Ward, Clark H. Mellichen, Atlanta, for appellant.

N. Forrest Montet, David M. Leonard, Hurt, Richardson, Garner, Todd & Cadenhead, T. Cullen Gilliland, Atlanta, for appellees.

UNDERCOFLER, Presiding Justice.

The following question has been certified to this court from the United States Court

Exhibit C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense;"

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "... nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "No State shall... deprive any person of life, liberty, or property, without due process of law."

Appendix B

The following are those provions of the Georgia Code Annotated that are involved in this case:

27-2206 Counsel prohibited from arguing possibility of executive clemency; mistrial for violation of rule

No attorney at law in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury, because pardon, parole, or clemency of any nature may be granted by the Governor, State Board of Pardons and Paroles, or other proper authority vested with the right to grant clemency. If counsel for either side in a criminal case should so argue to the jury, opposing counsel shall have the right to immediately request the court to declare a mistrial; and in which case, it shall be mandatory upon the court to declare a mistrial; and upon failure so to do, same shall constitute reversible error.

This section shall be construed as setting forth regulations in addition to those provided for in section 24-3319 and section 81-1009.

(Acts 1955, pp. 191, 192.)

27-2503 Presentence hearings in felony cases

(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed.

In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the

evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

(Acts 1974, pp. 352, 257.)

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated

battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

(Acts 1973, pp. 159, 163.)

27-2537 Review of death sentences

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be

in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred

to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

(Acts 1973, pp. 159, 165.)

Exhibit D

[12] 7. The jury sentenced Redd to death after finding him guilty of murder in the course of kidnapping with bodily harm to the victim, which is an aggravating circumstance authorizing the ultimate penalty under Code Ann. § 27-2534.1(b)(2). In Enumeration 10 Redd argues correctly that his death sentence must be set aside for failure of the trial court to make clear to the jury in his charge taken as a whole that they might in their discretion recommend a life sentence even if they found the existence of a statutory aggravating circumstance. *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977); *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977). The lack of clarity in the charge was raised below by specific objection by Redd's attorney, but no recharge was made. Accordingly, the death sentence must be overturned and Redd must be resentenced, which also has the effect of mooting Enumerations 9, 11 and 12 which attack other aspects of the sentencing procedure.

Redd's conviction and life sentence for kidnapping are affirmed. His murder conviction is affirmed, but the sentence is set aside and a new trial is ordered on the issue of punishment for that offense.

Judgment affirmed in part and reversed in part.

All the Justices concur, except JORDAN, J., who dissents.

JORDAN, Justice, dissenting.

I dissent to Division 7 of the opinion in which the death sentence is set aside and a new trial ordered as to punishment. In my opinion the charge taken as a whole meets the requirement of the law.

On the punishment phase of the trial, the court charged the jury to "consider all of the evidence received by you in open court, in both phases of the trial. You are authorized to consider all the facts and circumstances of the case." The charge made it clear that the crimes for which the defendant had been found guilty were punishable by death or life, and that it was their duty to determine the penalty within the established limits. The court further correctly charged that "before you would be authorized to find a verdict fixing a sentence of death . . . , you must find evidence of statutory aggravating circumstances . . ."

In my opinion this charge made it quite clear that the jury could consider all of the facts and circumstances of the case, including evidence in mitigation and aggravation, in order to arrive at the proper penalty and that they were authorized to fix the punishment at *either* death or life. The charge on aggravating circumstances did not mandate a sentence of death if such was found, but merely *authorized* the death penalty.

I think the jury fully understood its duties and prerogatives under the charge as given. I would affirm.

240 Ga. 759

Eddie SPRAGGINS

v.

The STATE.

No. 32605.

Supreme Court of Georgia.

Feb. 21, 1978.

Defendant was convicted before the Superior Court, Meriwether County, Joseph C. Jackson, J., of rape and murder, and he appealed. The Supreme Court, Hill, J., held that: (1) evidence was sufficient to sustain convictions; (2) GBI agent's voluntary testimony that defendant was known to have been drinking on night before offenses and that agent had learned that defendant "was the type [of] person * * * who got into fights. They had a bit of trouble with him periodically" was not so prejudicial that it could not be cured by certain instructions, but (3) failure to instruct that jury could

recommend life sentence even if they found existence of a statutory aggravating circumstance and that they were authorized to consider mitigating circumstances was error requiring that death penalty be set aside and that there be a new sentencing trial.

Judgment affirmed as to the convictions; reversed as to the death sentence for murder.

Jordan, J., dissented to the reversal of death sentence for reasons set forth in another case.

1. Homicide ⇐250
Rape ⇐51(1)

Evidence, including defendant's statement to effect that he had killed victim and circumstantial evidence of carnal knowledge of victim, was sufficient to sustain defendant's conviction of rape and murder. Code, § 26-2001.

2. Criminal Law ⇐1169.5(4)

In proceeding in which defendant was convicted of rape and murder, GBI agent's voluntary testimony that defendant was known to have been drinking on night before offenses and that agent had learned that defendant "was the type [of] person * * * who got into fights. They had a bit of trouble with him periodically" was not so prejudicial that it could not be cured by instructions that jury was to disregard anything said about defendant in regard to drinking or trouble he might have had with police and that State had burden of proving that defendant committed crime for which he was charged. Code, § 38-202.

3. Homicide ⇐311, 341

In proceeding in which defendant was convicted of rape and murder and was sentenced to death, failure to instruct that jury could recommend life sentence even if they found existence of a statutory aggravating circumstance and that they were authorized to consider mitigating circumstances was error requiring that death penalty be set aside and that there be a new sentencing trial. Code, §§ 27-2503, 27-2534.1(b), (b)(2, 4, 7), (c), 27-2537(c)(1).

A. Vernon Belcher, Greenville, for appellant.

William F. Lee, Jr., Dist. Atty., Greenville, Arthur K. Bolton, Atty. Gen., John W. Dunsmore, Jr., Asst. Atty. Gen., Atlanta, for appellee.

HILL, Justice.

This is a death case. The defendant Eddie Spraggins, along with Freddie Davis,[1] was indicted in Meriwether County for the January 31, 1977, rape and murder of Miss Frances Coe. After a special jury found the defendant sane at time of trial, he was tried and found guilty on March 1 and 2, 1977, on both counts. Upon the jury's finding of a statutory aggravating circumstance to the murder charge, that the murder was committed while the offender was engaged in the rape, the defendant was sentenced to death for murder and life imprisonment for rape.

Evidence was presented from which the trial jury was authorized to find the following: On the afternoon of January 31, 1977, the semi-nude body of Frances Coe, age about 55, was found in her home in Manchester, Georgia. She had been repeatedly stabbed, slashed and cut, including having her throat cut. There were several wounds to the body which caused the victim to bleed heavily, with the most severe stab wounds being in the upper abdomen and lower chest, including two in the upper abdomen which penetrated the heart. She had been partially disembowelled. Death was attributed to a loss of blood.

The victim was found lying partially on her bed. Her sweater was open, her slip had been pulled up and her pantyhose and panties had been pulled down. There was testimony that there had been manipulation of the victim's sexual organs. There were bruises on her thigh and in the vicinity of the vaginal opening. There was hemorrhaging around the urethra and a small tear in the vaginal orifice. Doctor Byron

1. See *Davis v. State*, 240 Ga. 763, 243 S.E.2d 12 (1978).

Dawson who performed the autopsy testified that although no sperm cells were found, in his opinion the injuries he described were consistent with those associated with sexual relations.

The defendant and the victim were neighbors. The night of the murder the defendant was seen burning something in his back yard. A zipper and cloth material and a flashlight of the type owned by the victim were recovered from the ashes.

When told that there was a warrant out for his arrest, the defendant stated that there was nothing to it, that he had hit somebody but that he did not get any money out of her.

In a pre-trial statement to a GBI agent (following appropriate advice concerning his rights) the 34-year-old defendant was quoted as follows: "On Sunday night, the 30th of January, 1977, Freddie Davis and I went to Frances Coe's house. We had been talking about robbing Frances Coe for a long time. We stopped at the back of the house, and I told Freddie to stay at the back and I went to the front, knocked on the door and Frances Coe let me in. I told her I wanted to use the telephone. I told her to open the back door and let Freddie in. I hit her and she started screaming. I got her around the neck and held her while I opened the back door. Freddie came in. I pulled her back into the bedroom. I had my hand over her mouth to keep her from hollering. Freddie said, 'Shut her up,' and handed me his knife, and I opened the knife and stabbed her and cut her throat. She just would not die and I just kept cutting. Freddie said, 'You got to finish her off.' I wiped the blood off my hands on a towel. I gave the knife back to Freddie. Freddie got her flashlight looking for money. After we left, he gave me the light. I burned it and a blue windbreaker behind my house."

The defendant presented two witnesses in addition to his own testimony. One witness testified that the defendant had worked for her husband but that he could only perform small uncomplicated menial tasks helping her husband do odd jobs around the house. She said that he could not count change for a dollar, and that she did not think he could read or write. The defendant's sister testified that he could never learn in school and always had mental problems and they sought help for him in a number of different places.

The defendant testified that he did not remember going to Frances Coe's house; that he drank heavily; that he did not rape her, nor had he ever raped anyone; that he could not read; and that he had never told law enforcement officers that he had participated in her killing.

On cross examination the defendant admitted he had burned several coats and "I might have did burn the flashlight too." He admitted that when he was arrested he was in the trunk of Buddy Mullis' automobile, and stated that he was not exactly hiding and that he found it comfortable in the trunk because it was a good place where he could lie down and rest when he wanted to be by himself.

On appeal the defendant enumerates two errors.

[1] 1. In the defendant's first enumeration he asserts that the trial court erred in denying his motion for new trial based on the general grounds. The evidence as to murder is more than adequate. In view of the death of the victim there is, however, no direct evidence as to the rape. Specifically, the evidence as to the second element of carnal knowledge, Code § 26-2001, is circumstantial at most. Considering all the facts and circumstances, however, we find that there was sufficient evidence regarding rape to support the jury's verdict. *Harris v. State*, 236 Ga. 242(1), 223 S.E.2d 643 (1976). It was not error to overrule the motion for new trial based on the general grounds.

[2] 2. In Enumeration 2 defendant asserts that the trial court erred in denying his motion for mistrial when a GBI agent voluntarily testified as to the defendant's character.

While the officer was testifying for the state the district attorney asked him: "Q.

Now, based on the evidence that you gathered in your investigation, you confronted the defendant Eddie Spraggins, is that correct?" The officer deviated, saying: "A. Not at this time. We continued to gather other things. Eddie Spraggins was known to have been drinking the night before and in this area. I did a little background work on Eddie Spraggins from the police department and learned that he was the type person, you know, who got into fights. They had a bit of trouble with him periodically. In addition to this, just prior to—" The district attorney interrupted asking: "Q. But, you did eventually go to him, is that correct?" The officer answered: "A. Oh, yes sir. I did eventually go to him. I was just telling you the background, what led me to him." The district attorney next asked the officer if he had had a conversation with the defendant.

Thereafter the jury was excused and a *Jackson-Denno* hearing was held. At its conclusion, defendant's counsel moved for a mistrial because the officer had injected the defendant's bad character into evidence. The court overruled the motion for mistrial but on return of the jury the trial court instructed the jury as follows: "The court instructs you to disregard anything that might have been said pertaining to this defendant in regard to any drinking or any fighting or any conflicts, any trouble he might have been in with the Manchester Police Department, because that has no bearing on this case whatsoever. The purpose of this case is to determine whether or not this defendant did commit the crime for which he is charged. The state has the burden of proving that and not anything other than that shall be considered in the trial of this case."

We do not find that the officer's improper comments in the presence of the jury were so prejudicial that the curative instructions by the court were ineffective. The trial court did not abuse its discretion in refusing to grant the motion for mistrial. *Googe v. State*, 237 Ga. 175(1), 227 S.E.2d 51 (1976); *Lynch v. State*, 234 Ga. 446, 448, 216 S.E.2d 307 (1975); *Woods v. State*, 233 Ga. 495, 497–498, 212 S.E.2d 322 (1975); *Wingfield v. State*, 231 Ga. 92(8), 200 S.E.2d 708 (1973); Code Ann. § 38–202.

3. *Sentence review.*

[3] After finding the defendant guilty of murder and rape at the guilt-innocence phase of the trial, at the sentencing phase the jury found that the offense of murder was committed while the offender was engaged in the commission of another capital felony, the rape, and imposed the death penalty. This was the only aggravating circumstance as to which the defendant had been put on notice. Code Ann. § 27–2503. Cf. Code Ann. § 27–2534.1(b)(2), (4) and (7).

We first consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. Code Ann. § 27–2537(c)(1).

The court's sentencing instructions failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance (*Fleming v. State*, 240 Ga. 142(7), 240 S.E.2d 37 (1977), and failed to inform the jury that they were authorized to consider mitigating circumstances in contravention of requirements laid down in Code Ann. §§ 27–2534.1(b) and 27–2534.1(c), *Hawes v. State*, 240 Ga. 327(9), 240 S.E.2d 833 (1977)). The jury instructions in the case before us failed to comply with the requirements of *Fleming* and *Hawes* and thus the death penalty must be set aside and a new sentencing trial allowed.

Judgment affirmed as to the convictions; reversed as to the death sentence for murder.

All the Justices concur, except JORDAN, J., who dissents from the reversal of the death sentence.

JORDAN, Justice, dissenting.

I dissent to the reversal of the death penalty for the reasons set forth in my dissent in *Redd v. State*, 240 Ga. 753, 243 S.E.2d 16 (1978).

Exhibit E

Now, His Honor will charge you that the defendant comes into this court with the presumption of innocence in his favor and the burden rests upon the State to satisfy your minds to the reasonable doubt that this defendant is guilty and that he should be executed.

Now, with these brief remarks I am going to leave it with you and ask you to bring back a verdict here recommending mercy. Then the Judge will sentence him to life in prison and he will never get out. He is not even eligible until he has been in there for 25 years. And with these remarks, I thank you.

THE COURT: Ladies and gentlemen of the jury, this defendant has been found guilty of the offense of murder. It is now your duty to determine within the limits prescribed by law the penalty that shall be imposed for that offense.

Under the laws of this state, every person guilty of the offense of murder shall be punished by life imprisonment or death by electrocution. In all cases for which the death penalty may be authorized, the law provides that the judge

shall instruct the jury concerning any evidence in extenuation, mitigation and aggravation, which the jury may consider in making their decision as to what punishment is to be imposed upon the defendant.

In reaching your determination, you are authorized to consider all of the evidence received by you in open court.

You are authorized to consider all of the facts and circumstances of the case.

Ladies and gentlemen of the jury, in reaching your verdict you are authorized to consider all of the facts and circumstances, if you find there be any, in mitigation of punishment. In determining whether mitigating circumstances exist, you are authorized to consider all of the evidence produced by the State and the defendant throughout this trial.

Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime, but which may be considered as extenuating or reducing the moral culpability or blame.

In reaching this verdict, you are not required to find mitigating circumstances

in order to recommend the sentence of life in prison. You may recommend a sentence of life imprisonment regardless of whether or not you believe mitigating circumstances exist in this case.

Ladies and gentlemen of the jury, I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory aggravating circumstances as I will define to you later in this charge, sufficient to authorize the supreme penalty of the law.

Aggravating circumstances are those which increase the guilt or enormity of the offense or as to its injurious consequences.

The law provides that when a party is tried by a jury, and is convicted of an offense that may be punished by death, the sentence of death shall not be imposed, unless the jury's verdict includes a finding of at least one aggravating statutory circumstance and a recommendation that the death sentence be imposed. When a statutory aggravating circumstance is found, and a recommendation of death is made, the Court shall sentence the defendant

to death.

When a sentence of death is not recommended by the jury, the Court shall sentence the defendant to prison for and during his natural life.

Therefore, before you would be authorized to recommend a sentence of death, in this case, you must find that the State has proved at least one of the following statutory aggravating circumstances to exist beyond a reasonable doubt:

One, the offense of murder was committed while the offendor was engaged in the commission of additional capital felonies, to wit, the rape of Frances Coe.

Two, the offense of murder was outrageously and wantonly vile, horrible and inhuman and in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

Now, ladies and gentlemen of the jury, a list of these aggravating circumstances that the State contends exist in this case are listed on a piece of paper and will be out with you in the jury room during your deliberations.

Ladies and gentlemen of the jury, if you do not find that the State has proved at least one of these statutory aggravating circumstances beyond a reasonable doubt, then you must recommend a sentence of life imprisonment.

If you should find that the State has proved at least one of the statutory aggravating circumstances beyond a reasonable doubt, then you still may, if you so choose, recommend a sentence of life imprisonment.

If you find the State has proved at least one of the statutory aggravating circumstances beyond a reasonable doubt, then you may recommend that the death penalty be imposed, but you are not required to do so.

Now, ladies and gentlemen of the jury, a reasonable doubt is a doubt for which you can give a reason, and means just what it says. It is the doubt of a fair-minded impartial juror honestly seeking the truth -- not an arbitrary or capricious doubt, but a doubt arising from a consideration of the evidence, or from a lack of evidence, or from a conflict of evidence.

Ladies and gentlemen of the jury, upon

retiring to the jury room, you will select one of you to act as foreman or forelady, who will preside over your deliberations, and who will sign the verdict to which all 12 of you freely and voluntarily agree. Your initial conduct upon entering the jury room is a matter of importance. It is not wise to immediately express a determination or insist upon a certain verdict. If your sense of pride is aroused, you may hesitate to change your position if you decide if you are wrong. Consult with one another and consider each other's views. Each of you must decide this case for yourselves, but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if you are convinced that it is wrong. However, you should never surrender honest convictions or opinions in order to be congenial, or to reach a verdict solely because of the opinions of other jurors.

Now, I charge you that the verdict you return in this case must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree

thereto. The verdict must be unanimous.

Now, ladies and gentlemen of the jury, after a careful consideration of all of the evidence, facts and circumstances of this case, under the rules of law that I have given you in charge, if your verdict should be death, then the form of your verdict would be:

"We, the jury, recommend death. We find the following aggravating circumstances:"

Listing the circumstances that you find.

On the otherhand, if you do not find that there was one or more aggravating circumstances, or it is your verdict that you do not recommend death in this case, then the form of your verdict would be:

"We, the jury, affix punishment at life."

Whatever your verdict may be, it can be written by filling in the blanks and marking out that which does not apply so as to make this form, which I have prepared for you, speak the true verdict of the jury. Please remember to mark out the part of the form that does not apply and fill in the blanks that do apply. Your verdict should be dated, and should be signed by your foreman.

Ladies and gentlemen of the jury, you may retire to fix the punishment in this case. You may begin deliberating as soon as you receive the indictment and all the evidence that was introduced in this case. However, ladies and gentlemen of the jury, before you retire, I hereby instruct the two alternate jurors to keep their seats until the other 12 jurors have gone to the jury room. Let this jury go to the jury room.

(Thereupon, the jury exited the hearing room.)

THE COURT: You all gather up the evidence.

Now, in regard to you two alternate jurors, you will not sit in on the deliberations of the jury in this matter unless you are needed later on. Another room has been made available to you where you will remain under guard by a court bailiff so you will be available if you are needed.

Let these two alternate jurors go to one of the witness rooms with a bailiff on guard.

(Thereupon, the two alternate jurors exited the hearing room.)

THE COURT: All right, you other bailiffs

gather up all this evidence including the indictment, the form of the verdict, and take it into the jury room for their consideration.

(Thereupon, a recess was taken while the jury deliberated the case.)

THE COURT: Let the record reflect that the jury has announced it has reached a verdict. The defendant is in the courtroom. The defendant's lawyer is in the courtroom.

Let the jury come in.

(Thereupon, the jury entered the hearing room.)

THE COURT: Let's everybody be seated and quiet.

Ladies and gentlemen of the jury, have you reached a verdict?

THE FOREMAN: Yes, we have.

THE COURT: The Court would like to announce that regardless of what the verdict is, there will be no outbursts. Everybody will remain seated until we have recessed court and the jury is escorted from the courtroom.

All right, receive the verdict, Mr. Lee.

MR. LEE: Madame Foreman, you must strike out one of the two verdicts. Don't strike out what does not apply. If you recommend life,

Exhibit F

THE STATE : CASE NO. 1188

VS : MERIWETHER COUNTY

EDDIE SPRAGGINS : SUPERIOR COURT

CRIM. MIN. BOOK 10 PAGE 526

PUNISHMENT CHARGE

LADIES AND GENTLEMEN OF THE JURY, THE DEFENDANT IN THIS CASE HAS BEEN FOUND GUILTY OF THE OFFENSE OF MURDER, AND IT IS YOUR DUTY TO DETERMINE, WITHIN THE LIMITS PRESCRIBED BY LAW, THE PENALTY WHICH SHALL BE IMPOSED AS PUNISHMENT FOR THAT OFFENSE.

UNDER THE LAWS OF THIS STATE, PUNISHMENT FOR THIS OFFENSE IS DEATH BY ELECTROCUTION, OR BY LIFE IN PRISON. I CHARGE YOU THAT TO RETURN A VERDICT RECOMMENDING DEATH, THERE MUST BE SOME AGGRAVATING CIRCUMSTANCE, OR CIRCUMSTANCES FOUND BEYOND A REASONABLE DOUBT.

I CHARGE YOU THAT YOU MAY LOOK TO SEE IF THERE WAS ANY ONE OR MORE OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES:

(1) The offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: the Rape of Frances Coe.

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(2) The offense of Murder was outrageously and wantonly vile, horricle and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

IF YOU FIND THERE WAS ONE OR MORE OF THESE AGGRAVATING CIRCUMSTANCES, ESTABLISHED BEYOND A REASONABLE DOUBT, YOU MAY FIX PUNISHMENT AT DEATH.

IN THIS EVENT, THE FORM OF YOUR VERDICT WOULD BE:

"WE, THE JURY, RECOMMEND DEATH". "WE FIND THE FOLLOWING AGGRAVATING CIRCUMSTANCES; (1) The offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: the Rape of Frances Coe.

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(2) The offense of Murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

IF YOU DO NOT FIND THAT THERE WAS ONE OR MORE AGGRAVATING CIRCUMSTANCES, THEN THE FORM OF YOUR VERDICT WOULD BE, "WE, THE JURY, FIX PUNISHMENT AT LIFE".

WHATEVER YOUR VERDICT MAY BE, IT CAN BE WRITTEN BY FILLING IN THE BLANKS, AND MARKING OUT THAT WHICH DOES NOT APPLY SO AS TO MAKE THIS FORM WHICH I HAVE PREPARED FOR YOU SPEAK THE TRUE VERDICT OF THE JURY.

THE VERDICT SHOULD BE DATED AND SIGNED BY ONE OF YOUR MEMBERS AS FOREMAN.